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**In The  
Supreme Court of the United States**

**October Term, 1977**

**No. 76-1777**

**JAMES W. BENSON AND ONE 1968 VOLKSWAGEN,**  
*Petitioners,*

**vs.**

**STATE OF NEBRASKA,**  
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**BRIEF FOR RESPONDENT  
IN OPPOSITION**

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I.

OPINIONS DELIVERED IN COURTS BELOW

The respondent accepts the Petitioner's respective statement of the opinions delivered by the Nebraska Supreme Court.

II.

JURISDICTIONAL STATEMENT

Respondent accepts petitioner's jurisdictional statement.

**III.****CONSTITUTIONAL PROVISIONS, STATUTES  
AND RULES INVOKED**

Respondent accepts petitioner's statement of the constitutional provisions and statutes invoked.

**IV.****QUESTION PRESENTED**

Respondent accepts petitioner's statement of the question presented.

**V.****STATEMENT OF THE CASE**

Respondent specifically objects to two statements contained in petitioner's statement of the case. On page 4, ¶ 2, the petitioner states that Officer Hogg "... was on duty and traveling along Interstate 80 behind petitioner's vehicle when he overheard a dispatch from the Wahoo County Sheriff's Office." Reference to the record will disclose that the radio broadcast had been received approximately one-half hour before Officer Hogg came upon the petitioner's vehicle (Vol. I, 15:3-16:13). On page 5 of his brief, petitioner states that "the California method of registration has not changed for over 30 years." Respondent takes exception to this bold statement in view of the lack of any citation supporting the same. Respondent generally accepts the remainder of the petitioner's statement of the case except those portions which constitute conclusions, are argumentative or that relate to the propriety of the actions of the officer subsequent to the initial

stop. It is respondent's position that the only pertinent facts being inquired into are that an officer of the Nebraska State Patrol, while in uniform and on duty, stopped the petitioner on Interstate 80 in Lancaster County, Nebraska, at approximately 6:00 p. m., on October 16, 1974.

**ARGUMENT**

A state statute which sanctions a limited detention stop of a vehicle for proof of registration and operator's license, even in the absence of specific or articulated facts to lead the enforcement officer to the conclusion that there is a violation of the law, is not inconsistent with the Fourth Amendment of the United States Constitution.

Petitioner alleges that Section 60-435, R. R. S. 1943, is in absolute conflict with the Fourth Amendment. He contends that travelers of the nation's highways, upon crossing the border into the State of Nebraska are stripped of Fourth Amendment rights. In so alleging the petitioner ignores decisions of this Court which have long held that statutes authorizing reasonable search and seizures in regulated activities, even in the absence of specific or articulable facts which would lead an officer to conclude that there is a violation of the law, are constitutionally sound. *United States v. Biswell*, 406 U. S. 31 (1972); *Boyd v. United States*, 116 U. S. 616 (1886). It is not the crossing of state lines that affects petitioner's Fourth Amendment rights. It is, rather, his choice to do so by operating



a motor vehicle, the most prominent symbol of our modern technology which is subject to registration and the licensing of its operator in every state of this union.

Respondent concedes that the interpretation placed on Section 60-435, R. R. S. 1943, eliminates the requirement for "founded or articulable suspicion" as expressed in *Terry v. Ohio*, 392 U. S. 1 (1968). The unquestioned purpose of the statute is to provide reasonable enforcement procedures to insure that vehicles and their operators are in compliance with Nebraska law. The statute does not seek to enforce any "unreasonable" burden upon those individuals traveling the highways of Nebraska. The enactment of the statute and its proper enforcement shows a concern for the tremendous loss of life, serious injury and property damage which occurs on our nations highways. We believe that the statute strikes a proper balance between the rights of the individual to be free from unreasonable intrusion by law enforcement personnel and the corresponding need for those individuals who travel our highways to be protected from vehicles and individuals which are not fit to exercise the privilege.

Considering the tremendous loss of life on our nation's highways, the inconvenience associated with a short detention stop to check driver's license and vehicle registration is a minor inconvenience. We do not view it as a "serious intrusion upon the sanctity of the person" as described by Chief Justice Warren in *Terry v. Ohio*, *supra*, where the "citizen stands helpless, perhaps facing a wall with his hands raised." *Terry v. Ohio*, *supra*, at 17. Being stopped by a uniformed road patrol officer and questioned while seated in your vehicle is dramatically different from

being approached by a uniformed or plainclothes policeman on a public street and subjected to a "frisk." To compare the two is to ignore the generally accepted human perceptions of suspected criminal activity versus minor traffic violations. Thus, it is no surprise that a general rule adopted by state and federal courts subsequent to *Terry v. Ohio*, *supra*, approves driver's license and motor vehicle registration detention stops absent articulable facts. *Palmore v. United States*, 290 A. 2d 573 (D. C. App. 1972), *aff'd* 411 U. S. 389 (1973) (cert. denied on Fourth Amendment claim and *aff'd* on other grounds); *United States v. Ware*, 457 F. 2d 828 (7th Cir. 1972); *United States v. Kelley*, 462 F. 2d 372 (4th Cir. 1972); *Taylor v. State*, 9 Md. App. 402, 264 A. 2d 870 (1970); *State v. Severance*, 108 N. H. 404, 237 A. 2d 683 (1968); *United States v. Lapinski*, 460 F. 2d 234 (10th Cir. 1972); *United States v. Jenkins*, 528 F. 2d 513 (10th Cir. 1975); and *United States v. Turner*, 442 F. 2d 1146 (8th Cir. 1971).

This Court has most recently recognized the "reasonableness" of license and registration checks by uniformed police officers. In *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975), the Court, by way of footnote, stated:

"Our decision in this case takes into account the special function of the border patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists or their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our

*decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters."* (Emphasis added.) 22 U. S. at 883.

The Nebraska Supreme Court has not chosen, as petitioner would have us believe, to ignore the precious rights guaranteed by the Fourth Amendment, and by Article I, Section 7 of the Constitution of Nebraska. On the contrary, the Court is highly sensitive to these constitutional rights and has and will continue to strictly limit the application of Section 60-435, R. R. S. 1943, in seeking an appropriate balance between the rights guaranteed by the Fourth Amendment and the unquestioned need to protect all individuals who travel the state's highways. In *State v. Holmberg*, 194 Neb. 337, 231 N. W. 2d 672 (1975), in which the Court first considered and construed Section 60-435, R. R. S. 1943, law enforcement personnel were explicitly reminded that:

"We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. We hold further that when the driver has produced his license and they are in proper form, he must be promptly allowed to continue on his way. It is only when, as here, the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning." 194 Neb. 337 at 346.

At the above quoted section of *State v. Holmberg, supra*, was no idle threat is readily apparent from the Nebraska Supreme Court's findings in *State v. Colgrove*, 198 Neb. 321, 223 N. W. 2d 20 (1977), where the Court was faced with the following factual situation. A deputy sheriff of Scotts Bluff County, Nebraska, met with an officer of the Minatare, Nebraska, Police Department. The deputy had a warrant for the arrest of two female suspects and was seeking the assistance of the police officer to find and arrest the suspects. A vehicle drove by the location where the officers were meeting. The officers stated that it was similar to one that might be driven by the female suspects. The officers followed the vehicle and stopped it a short time later. After the vehicle was stopped, but before it was approached by the officers, it became clear to the officers that the persons in the car were male and not female. The deputy acknowledged that the only reason for stopping the car was to serve the warrants on the females. Both officers acknowledged that there was no violation of law by the driver of the car or by its occupants, that neither the car nor its occupants had done anything to arouse any suspicion in their minds, nor were they investigating any crime. The deputy sheriff then announced that he was going to check the identity of the occupants of the car. He testified that his purpose was to determine that they were not the female suspects. He approached the vehicle and asked the persons in the vehicle for identification. The operator failed to produce a license. He required the operator to get out of the car and requested that he exhale, whereupon he detected an odor of burned marijuana on the subject's breath. A subsequent search of the motor vehicle produced marijuana and a concealed weapon for



which crimes the defendant was charged and convicted. In reversing the conviction the Supreme Court of the State of Nebraska stated:

"Neither does this case come within the purview of *State v. Holmberg*, 194 Neb. 337, 231 N. W. 2d 672, where we considered and construed section 60-435, R. R. S. 1943, which authorizes the stopping of a vehicle for the purpose of checking registration and operator's license. There is no claim in this case that the stop in this instance was for that limited purpose. The admitted purpose here was to determine, for some reason which the record does not disclose, the identity of the car's occupants. It is readily apparent that if an officer without any cause for suspicion whatever may stop any and all vehicles for the purpose of determining the identity of the occupants, then the expectation of privacy to which persons traveling in motor vehicles are entitled under the Fourth Amendment to the Constitution of the United States, and under Article I, section 7, of the Nebraska Constitution, is of no value whatever. . . . In *State v. Holmberg*, *supra*, we said in pointing out the possibility of abuse of the rights under section 60-435, R. R. S. 1943: 'We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment.' We find that the investigatory stop in this case was in violation of the Fourth Amendment to the Constitution of the United States, and Article I, section 7, of the Constitution of Nebraska." 198 Neb. at 324, 325.

The consequences of accepting the propositions urged by petitioner should be carefully analyzed by this Court. If Section 60-435, R. R. S. 1943, is to be judged unconstitutional as being in conflict with the Fourth Amendment, then, would the following law enforcement practices be similarly prohibited:

1. Routine requests for production of a fish or game license by a state or federal game and parks officer?

2. Routine inspection request of a retail establishment, either corporate or sole proprietorship, to produce sales tax registration information?

3. Routine inspections for safety violations by Coast Guard officials of motor boats traveling in coastal or inland waterways?

4. Routine search of persons and baggage previous to boarding an airplane?

The aforementioned examples all describe some type of activity which is considered a "privilege" subject to licensing or comprehensive state or federal regulation. As with driver's license and motor vehicle registration, it would appear hopeless, if not impossible, to detect violations without routine and random requests for proof of compliance. Respondent does not argue with the fact that these detentions are not at times troublesome or irritating, but in view of the benefit to be afforded to society they cannot be considered to be "unreasonable," and thus subject to the Fourth Amendment.

The facts in the present case and those in cases which respondent cites as support are not equivalent to the "troublesome issues regarding a sensitive area of police activity" as "stop and frisk" was described by Chief Justice Warren in *Terry v. Ohio*, *supra*. The statute in question does not call for "unreasonable search and seizure" but attempts in a sensitive way to exercise legitimate police powers over a privilege, the abuse of which causes tremendous loss of life and injury.

**CONCLUSION**

For reasons stated above, it is respectfully requested that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

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